Supreme Court, U.S.
FILED
99 823 SEP 20 1999
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No.

IN THE
Supreme Court of the United States

MARIO NIEMAN,

Petitioner,

v.

DRYCLEAN U.S.A. FRANCHISE COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, regulate conduct that occurs both in the United States and abroad but which relates to foreign commerce?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 178 F.3d 1126 (11th Cir. 1999) (App. A). The opinion of the district court is unreported (App. B).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on June 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), as enforced by private litigants under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204, provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 44 defines commerce to mean "commerce among the several states or with foreign nations."

STATEMENT OF THE CASE

Petitioner Mario Nieman ("Nieman") sued respondent in Florida Circuit Court in May of 1995. The lawsuit sought damages based on respondent's failure to refund a $50,000 deposit paid for the option to obtain the exclusive master franchise in Argentina for the "Dryclean USA" franchise. That deposit was paid by Nieman to respondent in Coral Gables, Florida. The case was subsequently removed to the United States District Court for the Southern District of Florida.

On cross-motions for summary judgment, the district court ruled in favor of Nieman, holding that respondent's failure to return the deposit was a violation of Section 5 of the Federal Trade Commission Act (the "FTC Act") and the rules promulgated under the FTC Act, and was therefore a violation of the Florida Deceptive and Unfair Trade Practices Act. The court of appeals reversed, holding, among other things, that the FTC Act did not apply due to the "extraterritorial" nature of the transaction. In so ruling, the Eleventh Circuit acknowledged a conflict between its ruling and the established law of the Seventh Circuit.

A. The Statutory Scheme for the Prevention of Unfair or Deceptive Practices

Section 5 of the FTC Act bars "unfair or deceptive practices." A violation of Section 5 of the FTC Act may be established by a showing of a violation of a rule promulgated by the FTC *or* by a showing that conduct in question is "unfair or deceptive." However, Section 5 of the FTC Act does not provide a private right of action for persons damaged by FTC Act violations.

Florida, like many states, provides a statutory cause of action for private litigants damaged by a violation of Section 5 of the FTC Act.[1] The Florida Deceptive and Unfair Trade

1. All fifty states and the District of Columbia have enacted one or more consumer protection statutes of general applicability. ABA Section of Antitrust Law, *Antitrust Developments* (4th ed. 1997), p. 654. While there are significant variations in the scope and content of these statutes from state to state, most of them prohibit "unfair or deceptive practices" or similar conduct. *Id.* Many of these statutes explicitly adopt the FTC Act or FTC precedents as standards of conduct. *See* ABA Section of Antitrust Law, *Reliance on FTC Consumer Protection Law Precedents in Other Legal Forums*, Working Paper No. 1 (1988).

Practices Act ("FDUPTA"), Fla. Stat. § 501.204, allows recovery of damages and attorneys' fees upon a showing of either a violation of an FTC Rule or a showing that conduct was "unfair or deceptive."

B. Proceedings Below

Nieman is a citizen of Argentina. Nieman signed an option contract with respondent in February of 1994, whereby he received the option for the exclusive Dry Clean USA master franchise for all of Argentina.

The option contract was initially negotiated during several meetings in Coral Gables, Florida, between the parties. Nieman was a resident of Florida at the time that negotiations with respondent began, but Nieman moved to Argentina before the execution of the option contract and the payment of the deposit. Final negotiations of the option contract took place telephonically between Coral Gables and Argentina. Ultimately, the option contract was signed by Nieman in Argentina and returned to respondent (with the deposit) in Coral Gables. The option contract was signed by respondent in Coral Gables.

In negotiating the option contract, respondent provided Nieman with a copy of its standard master franchise agreement. That proposed master agreement contained the following terms and conditions:

> This agreement shall be deemed made and entered into in Miami, Florida, U.S.A., and shall be governed by and interpreted in accordance with the laws of the United States of America and the State of Florida . . . [Nieman] agrees that all

> litigation initiated by Nieman to adjudicate a dispute under or in connection with this Agreement must be filed in the United States District Court for the Southern District of Florida or the courts of . . . the State of Florida.

Pursuant to the option contract, Nieman was required to pay respondent an initial $50,000 deposit, and was required to raise an additional $375,000 within a few months. Nieman was unable to raise the additional funds to make the $375,000 payment. Nieman requested that respondent return the initial $50,000 deposit, but respondent refused.

Nieman sued in Florida state court under several different legal theories, including a claim that respondent violated the FTC Act and FDUPTA by demanding a non-refundable deposit and failing to provide required disclosures under the FTC Act and the "FTC Franchise Rule" promulgated by the FTC pursuant to its rulemaking authority. After removal to federal court, all of Nieman's claims against respondent were voluntarily dismissed except for the FDUPTA claim.

The district court entered summary judgment in Nieman's favor, holding that respondent had violated the FTC Act and FDUPTA. The district court held that Nieman's claim was within the FTC Act's jurisdiction, citing *In Re Branch*, 141 F.2d 31 (7th Cir. 1944). As held by the district court:

> What the defendant suggests is that a U.S. franchisor may accept a $50,000 deposit from a foreign investor without making basic disclosures where it would be unlawful in a transaction involving a U.S. citizen. The defendant's

> argument is without merit. Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although *some* acts are done outside the territorial limits of the United States.

(App. B, 15a) (emphasis added).

The Eleventh Circuit reversed on two grounds. First, it held that the FTC Franchise Rule does not cover the sale of franchises to be located outside of the United States. (App. A, 9a-11a). Nieman does not seek review of this aspect of the Eleventh Circuit's opinion. Second, the Eleventh Circuit held that the "extraterritorial" nature of the transaction removes the transaction from the jurisdiction of the FTC Act. (App. A, 7a-9a).

REASONS FOR GRANTING THE WRIT

In this Petition, Nieman requests that the Court review the Eleventh Circuit's holding on the jurisdictional reach of the FTC Act (and, by implication, FDUPTA). Nieman seeks the opportunity to pursue his remedies under FDUPTA, and to litigate the question of whether respondent's conduct in Florida constitutes unfair or deceptive conduct under the FTC Act and FDUPTA. As noted by the district court, respondent failed to make "basic disclosures" (App. B, 15a) in its dealings with Nieman, and many of those dealings took place in Florida.[2]

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2. The sufficiency of pre-contract disclosures between franchisors and franchisees has been the subject of increasing judicial scrutiny outside the context of the FTC Franchise Rule. *See* Janet McDavid and Richard M. Steuer, "*The Revival of Franchise Antitrust Claims*," 67 Antitrust L. J., 209, 225 (1999), citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

Neither Nieman's foreign citizenship nor the location of the prospective franchises should absolve respondent from liability for deceptive negotiations that took place in Florida.

The Eleventh Circuit acknowledged that its decision on the extraterritorial application of the FTC Act is in conflict with the Seventh Circuit's decision in *Branch*.[3] The Eleventh Circuit's decision is erroneous, insofar as it ignores the plain purpose and language of the FTC Act and instead adopts a "balancing test" that would immunize illegal conduct which takes place in the United States if the primary situs of the underlying transaction is extraterritorial. Such a rule would drastically change the laws governing cross-border transactions, and would have a particularly adverse effect in international business centers such as Florida, California, Texas, and New York.

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3. As held by the Eleventh Circuit,

> It is true that the *Branch* court concluded that the FTC Act authorizes extraterritorial exercise of the FTC's unfair competition jurisdiction, which includes the Franchise Rule. However, *Branch* is not the law of this Circuit and is therefore persuasive authority at best. In view of subsequent Supreme Court decisions, we disagree with the *Branch* court's statutory analysis.

(App. A, 8a). The Eleventh Circuit was incorrect in its description of *Branch*, insofar as the *Branch* decision is based on the FTC Act's "unfair or deceptive" conduct jurisdiction, not its unfair competition jurisdiction. This is an important distinction, insofar as 15 U.S.C. § 45(3), the 1982 amendment to the FTC Act, narrows the unfair competition jurisdiction of the FTC Act.

I.

THE TEXT OF THE FTC ACT PROVIDES FOR CROSS-BORDER APPLICATION.

The jurisdiction enumerated in the FTC Act is quite broad. In the FTC Act, Congress "empowered and directed" the FTC "to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). The Act defines "commerce" to mean "commerce among the several states or with foreign nations." 15 U.S.C. § 44.

Notably, Congress chose in 1982 to limit the "foreign" commerce reach of Section 5 of the FTC Act as it pertains to "unfair methods of competition" (i.e., antitrust) claims by adding the following amendment:

> This subsection shall not apply to unfair methods of competition involving commerce with other nations (other than import commerce) unless —
>
> (A) such methods of competition have a direct, substantial and reasonably foreseeable effect —
>
> (i) on commerce which is not commerce with foreign nations or import commerce with foreign nationals; or
>
> (ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

> (B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.
>
> If this subsection applies to such method of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.[4]

15 U.S.C. § 45(3).

The express language of 15 U.S.C. § 45(3) speaks to a *narrowing* of the jurisdiction of the FTC Act (through its "shall not apply . . . unless" language) *only* as applied to unfair competition claims. The only reasonable interpretation of this narrowing is to conclude that the jurisdiction of the FTC Act for unfair and deceptive practices is *broader* than the unfair competition jurisdiction of 15 U.S.C. § 45(3). Since even the narrow jurisdiction of 15 U.S.C. § 45(3) contemplates jurisdiction in cross-border commerce, jurisdiction should have been found in the instant case.

In its ruling, the Eleventh Circuit relied on *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), which held that the EEOC laws do not apply to employees of United States companies who work outside the United States.[5] The language and purpose of the FTC Act differentiate this case

4. In certain circumstances, the FTC Act allows for jurisdiction for unfair method of competition claims even when *all* acts have been performed outside the United States. *See* 15 U.S.C. § 64.

5. The holding in *Arabian American Oil* was legislatively superseded by the Civil Rights Act of 1991.

from *Arabian American Oil.* That case involved the interpretation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e-2000e-17. However, Title VII does not make any mention of applicability to foreign commerce or to the invocation of Congress' powers to regulate foreign conduct. Indeed, the Senate deleted the terms "foreign nation" and foreign commerce" from Title VII before that bill was passed. *See Arabian American Oil,* 499 U.S. at 250.

The cross-border application of the FTC Act does not rely upon boilerplate "affecting commerce" language, but instead reflects an intentional decision by Congress to regulate foreign commerce. While this Court has in the past read a single statutory reference to "foreign commerce" to be an insufficient basis for extraterritorial application, the statutes at issue in those cases did not contain the FTC Act's statutory language specifically narrowing and delineating the scope of the foreign commerce to be regulated. *See, e.g., New York Cent. R. Co. v. Chisholm,* 268 U.S. 29 (1925) (no jurisdiction under Federal Employers' Liability Act over damages action by United States citizen for train accident in Canada); *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963) (National Labor Relations Act did not apply to foreign employees).

The Eleventh Circuit's opinion acknowledges Nieman's argument that "most if not all of the pertinent conduct subject to regulation occurred in Florida." (App. A, 5a at n.4). However, the Eleventh Circuit effectively immunized respondent's Florida conduct by holding that, since the primary focus of the relationship of the parties was

Argentinean, "[u]nder the circumstances of this case, if the Franchise Rule is to apply at all, it must apply extraterritorially. . . . Thus, for the Franchise Rule to have extraterritorial application, Congress must have intended the FTC Act to apply extraterritorially." *Id.*

The Eleventh Circuit's opinion imposes a balancing of interests test (similar to a conflict of laws analysis) which is contrary to the FTC Act, and contrary to the Seventh Circuit's holding in *Branch*. *See Branch,* 141 F.2d at 35 ("The Federal Trade Commission . . . seeks to protect petitioner's competitors from his unfair practices, begun in the United States and consummated in Latin America."). Simply put, if unfair or deceptive conduct takes place in the United States and affects United States commerce, the FTC Act should apply to that conduct even if additional improper conduct takes place outside the United States.

II.

THIS ISSUE HAS IMPORTANT RAMIFICATIONS FOR THE ENFORCEMENT OF THE FTC ACT AND RELATED STATE STATUTES.

Branch has been the final word on the application of the FTC Act for over 50 years. The rule put forth by the Eleventh Circuit would impose significant burdens on the prosecution of violations of the FTC Act by the FTC, by state regulators, and by state law private plaintiffs such as Nieman. Up until now, state unfair trade practices acts and state "baby FTC Act" claims had been regularly utilized across the nation to prosecute and/or sue people who operate businesses in the United States for the purpose of defrauding foreigners.

A jurisdictional bar to the application of the FTC Act in cross-border situations will lead to a substantial impairment in the reputation and credibility of *all* United States exporters. In *Branch*, the Seventh Circuit recognized that the FTC has an interest in compelling United States business persons to "use fair methods in competing with his countrymen." 141 F.2d at 34. In this case, United States franchisors who make full and adequate disclosures in selling master franchises are disadvantaged and prejudiced in competing with those who omit cautionary disclosures.

The rule established by the Eleventh Circuit would create a growth industry in United States-based fraudulent conduct. Ponzi schemes, business opportunity frauds, and bogus franchise sales would flourish, insofar as wrongdoers would have the ability to engage in deceptive and fraudulent conduct with respect to non-United States customers. For example, a business could set up shop in Miami solely for the sale of overpriced, misgraded, and/or fake gemstones to South Americans. Under the Eleventh Circuit's rule, neither the FTC nor the Florida Attorney General would be able to stop such conduct under the FTC Act or FDUPTA.

While the FTC Act does not exist to protect foreign customers, it is intended to protect United States businesses that participate in cross-border commerce. The integrity and global reputation of United States cross-border businesses would be significantly damaged if the United States were to become a safe haven for fraud directed at foreigners. The full enforcement and applicability of the FTC Act is necessary to prevent such harms to United States commerce.

CONCLUSION

For the reasons set forth above, Nieman respectfully requests that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 21, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4745

D.C. Docket No. 95-1390-CIV-FERGUSON

MARIO NIEMAN,

Plaintiff-Appellee,

versus

DRYCLEAN U.S.A. FRANCHISE COMPANY, INC.

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 21, 1999)

Before TJOFLAT and DUBINA, Circuit Judges, and SMITH*, Senior Circuit Judge.

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* Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Appendix A

SMITH, Senior Circuit Judge:

Dryclean U.S.A. Franchise Company, Inc. (DUSA) appeals the March 26, 1997 decision of the U.S. District Court for the Southern District of Florida, granting summary judgment to Mario Nieman.[1] Nieman sued DUSA for return of a $50,000 nonrefundable deposit, on the basis that DUSA failed to make certain disclosures required by the Federal Trade Commission's Franchise Rule, 16 CFR § 436.1 (1998). DUSA defended on the ground that the Franchise Rule does not apply to foreign transactions such as that between DUSA and Nieman. The district court held that the Franchise Rule applied extraterritorially and therefore Nieman was entitled to refund of his deposit. We reverse.

Facts and Proceedings Below

This case arises out of negotiations between DUSA and Nieman, an Argentine citizen,[2] concerning the possible opening of drycleaning franchises in Argentina. Nieman sought a master franchise agreement which would give him the right to sell franchises throughout Argentina. In February 1994, the parties executed a letter agreement. Nieman signed the agreement in Argentina, then mailed it back to DUSA in Florida, where DUSA's representative signed it. Under the terms of the agreement, Nieman gave DUSA a $50,000

1. Nieman's name is spelled "Neiman" on some documents in the record. We use the spelling used in Appellee's brief, the original complaint, and the judgment below.

2. Nieman was negotiating as part of a group of Argentine businessmen but only Nieman is involved in this appeal.

non-refundable deposit in exchange for DUSA's agreement not to negotiate with others regarding the Argentine master franchise agreement for sixty days. In effect, Nieman bought a sixty-day option to purchase the master franchise agreement.

Nieman intended to use the sixty-day period to arrange financing, but ultimately failed to raise the necessary capital. DUSA kept the non-refundable deposit and Nieman sued for its return under the Florida Deceptive and Unfair Trade Practices Act (DUTPA), FLA. STAT. ANN. §§ 501.201 to 501.211 (West 1994). The basis of Nieman's suit was that DUSA had failed to make the disclosures required under the DUTPA and under the Federal Trade Commission (FTC) Franchise Rule, 16 CFR § 436.1 (1998). DUSA defended on the ground that the DUTPA and the Franchise Rule do not apply because this transaction took place in Argentina and the DUTPA and the Franchise Rule have no extraterritorial application.[3] DUSA did not dispute that it failed to make the relevant disclosures.

Both parties moved for summary judgment. On March 26, 1997, the District Court for the Southern District of Florida granted summary judgment to Nieman. The court held that the DUTPA applied to this transaction because "Congress has the power to prevent unfair trade practices in

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3. DUSA also argued that Nieman lacked standing to sue under the DUTPA because that law was intended to protect consumers, not sophisticated businessmen like Nieman. The district court held that Nieman had standing. Because we conclude that the DUTPA and the Franchise Rule do not apply extraterritorially, we do not reach the standing issue.

foreign commerce by citizens of the United States, although some acts are done outside the territorial limits of the United States." The court ordered DUSA to refund the full amount of Nieman's $50,000 deposit. DUSA appeals.

Standard of Review

Our review of a trial court's grant of summary judgment is plenary. *Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir. 1995). We apply the same standard applied by the district court. *Rodgers v. Singletary*, 142 F.3d 1252 (11th Cir. 1998).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Here, the relevant facts are not in dispute. The only dispute concerns the extraterritorial application of the Florida DUTPA and, through it, the FTC Franchise Rule.

Extraterritorial Application of the FTC Franchise Rule

The Florida DUTPA defines a violation of that law to include violations of rules promulgated pursuant to the Federal Trade Commission Act. *See* FLA. STAT. ANN. § 501.203(3)(a) (West 1994). The FTC Franchise Rule was promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. *See* 16 CFR § 436 (1998). The DUTPA also creates a private cause of action where none exists under federal law. FLA. STAT. ANN. § 501.211 (West 1994). Thus,

under the DUTPA, a U.S. franchisee could sue a Florida franchisor such as DUSA for violating the Franchise Rule.

However, in order to provide a basis for a *foreign* franchisee to sue in regard to a foreign franchise deal, the Franchise Rule would have to apply extraterritorially.[4] An agency regulation has the force and effect of law only if it is authorized by congressional grant of authority; it is therefore subject to limitations imposed by Congress. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The Franchise Rule was promulgated by the FTC under the authority of the Federal Trade Commission Act. Thus, for the Franchise Rule to have extraterritorial application, Congress must have intended the FTC Act to apply extraterritorially.

It is undisputed that Congress has the power to regulate the extraterritorial acts of U.S. citizens. Whether Congress has chosen to exercise that authority, however, is an issue of statutory construction. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial

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4. Nieman argues that extraterritorial application of the Franchise Rule is unnecessary in this case because "most if not all of the pertinent conduct subject to regulation occurred in Florida." Nieman argues that DUSA's status as a Florida corporation doing business in Florida should make the DUTPA applicable regardless of the location of the prospective franchisee. We do not find this argument persuasive. In the negotiations which culminated in payment of the deposit, and which omitted the disclosures required by the Franchise Rule, DUSA negotiated with Argentine citizens, in Argentina, concerning an Argentine franchise system. Under the circumstances of this case, if the Franchise Rule is to apply at all, it must apply extraterritorially.

jurisdiction of the United States.' " *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). This presumption "is based on the assumption that Congress is primarily concerned with domestic conditions." *Foley Bros.*, 336 U.S. at 285. It also "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Arabian Am. Oil Co.*, 499 U.S. at 248 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)).

Mere boilerplate language in a statute is insufficient to overcome this presumption. The Supreme Court has "repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad." *Arabian Am. Oil Co.*, 499 U.S. at 251. The presumption against extraterritoriality can be overcome only by clear expression of Congress' intention to extend the reach of the relevant Act beyond those places where the United States has sovereignty or has some measure of legislative control. *See id.* at 248.

The courts "assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *Id.* Congress' awareness of the need to make a clear statement of extraterritorial effect is confined by the many statutes that explicitly refer to extraterritorial application. *See, e.g.*, the Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175(a) (1994) ("There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States.").

Appendix A

The FTC Act provides that "unfair or deceptive acts or practices in or affecting commerce[] are hereby declared unlawful." 15 U.S.C. § 45(a)(1) (1994). The Act defines "commerce" to mean "commerce among the several States or with foreign nations." 15 U.S.C. § 44 (1994). Based upon these passages, Nieman argues that the Act applies in this case; viz., that by defining commerce to include foreign commerce, Congress showed that it intended the FTC Act to apply extraterritorially.

Nieman cites *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944), to support his position. In *Branch*, the Seventh Circuit held that the FTC Act authorized the Federal Trade Commission to exercise jurisdiction over a U.S. correspondence school that made fraudulent representations to its Latin American customers. *Id.* at 35.

Branch does not support the exercise of authority by the FTC in this case. The court in *Branch* concluded that the FTC had jurisdiction to regulate the school's conduct with respect to foreign customers based on the effect on *domestic* competition. *See id.* at 34-35 ("The action of the Federal Trade Commission was aimed at compelling the petitioner to use fair methods in competing with his fellow countrymen. It was an attempt to eliminate the unfair, fraudulent, and deceptive practices of the petitioner from a field already occupied by several firms and potentially open to more. . . . The Federal Trade Commission does not assume to protect the petitioner's customers in Latin America. It seeks to protect the petitioner's competitors from his unfair practices.").

Thus, the *Branch* court found a basis for FTC jurisdiction based on the effect of the unfair trade practices on domestic competition, not on foreign customers. Here, by contrast, there is no evidence that DUSA's non-disclosure affected domestic competition in any way.

It is true that the *Branch* court concluded that the FTC Act authorizes extraterritorial exercise of the FTC's unfair competition jurisdiction, which includes the Franchise Rule. However, *Branch* is not the law of this circuit and is therefore persuasive authority at best. In view of subsequent Supreme Court decisions, we disagree with the *Branch* court's statutory analysis.

Rather, we agree with DUSA that the language of the FTC Act does not clearly indicate that Congress intended the ACT to apply extraterritorially. The provisions in the FTC Act that Nieman points to as supporting extraterritorial application of the Act are at best ambiguous and, more importantly, are virtually identical to those that the Supreme Court found *not* to support extraterritorial application of Title VII of the Civil Rights Act of 1964. *See Arabian Am. Oil Co.*, 499 U.S. at 249-251: Title VII stated that it applied to employers "engaged in an industry affecting commerce;" "commerce" being defined as "trade . . . among the several States; or between a State and any place outside thereof." The Court rejected the argument that these definitions were broad enough to support extraterritorial application. "The language relied upon by petitioners — and it is they who must make the affirmative showing — is ambiguous, and does not speak directly to the question presented here. The intent of Congress as to the extraterritorial application of

this statute must be deduced by inference from boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas." *Id.* at 250-251.

Title VII applied to employers "engaged in an industry affecting commerce," 499 U.S. at 249, while the FTC Act declares unlawful unfair practices "in or affecting commerce," 15 U.S.C. § 45(a)(1). Title VII defined commerce as "trade . . . among the several States; or between a State and any place outside thereof," 499 U.S. at 251, while the FTC Act defines commerce as "commerce among the several states or with foreign nations," 15 U.S.C. § 44. Given the similarity of these definitions, the scope of the statutes should be interpreted similarly. Thus, the Supreme Court's holding in *Arabian American Oil Co.* compels us to conclude that Congress did not intend the similarly worded unfair trade provisions of the FTC Act to apply extraterritorially. We therefore hold that the FTC Act does not authorize extraterritorial application of the Franchise Rule.

Further, even if Congress intended the unfair trade provisions of the FTC Act to give the FTC the authority to apply regulations extraterritorially, the evidence does not suggest that the FTC exercised such authority. Rather, the evidence shows that the FTC did not intend its Franchise Rule to apply to a U.S. franchisor in its dealings with foreign franchisees with respect to franchises to be located in a foreign country.

First, the Franchise Rule was not intended to protect franchisees in foreign countries. When it was promulgated,

the Rule was accompanied by a Statement of Basis and Purpose that reviewed the history of franchising in the United States and discussed measures that had been taken by various U.S. federal agencies and state governments to address unfair franchising practices. *See* 43 Fed. Reg. 59,621, 59,623-59,624 (1978). The Statement of Basis and Purpose is silent regarding the history or problems of franchising in other countries.

Second, the provisions of the Rule itself reveal a purely domestic focus. For example, the rule addresses potential conflicts with state law but does not mention foreign law. *See, e.g.*, 16 CFR § 436.1(a)(21) (disclosure statement shall not contain information "other than that required by this part or by State law not preempted by this part"). Also, the Rule mandates a cover sheet that directs prospective franchisees to consult appropriate state agencies but does not mention foreign governmental agencies. *See* 16 CFR § 436.1(d)(1) (cover sheet must state that "[t]here may also be laws on franchising in your State. Ask your State agencies about them.").

Third, the FTC has never indicated that the Franchise Rule was intended to apply to foreign franchisees. For example, the Final Interpretive Guides devote a section to potential conflicts between the Franchise Rule and state and local laws, but are silent with regard to foreign laws. 44 Fed. Reg. 49,966, 49,971 (1979).

Finally, the FTC recently issued an Advance Notice of Proposed Rulemaking, proposing to modify the Rule to "clarify" that it does not apply to the sale of franchises to be

located outside the United States. *See* 62 Fed. Reg. 9115, 9119 (1997); 62 Fed. Reg. 28,822, 28,823 (1997). Although the FTC has not issued a formal modification of the Franchise Rule, the Federal Register notices are evidence that extraterritorial application of the Rule was not contemplated at the time it was promulgated.

Conclusion

We have considered Appellee's other arguments for extraterritorial application of the Franchise Rule but find them to be without merit. For the reasons explained above, the Franchise Rule does not apply to the transaction between DUSA and Nieman. Therefore, DUSA's failure to comply with the disclosure requirements of the Franchise Rule does not provide Nieman with a cause of action to seek refund of his non-refundable deposit. Nieman asserted no other basis on which to recover his deposit. The district court therefore erred in granting summary judgment to Nieman. The judgment of the district court is reversed.

REVERSED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED MARCH 26, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-1390-CIV-FERGUSON

MARIO NIEMAN,

Plaintiff,

vs.

DRYCLEAN U.S.A. FRANCHISE COMPANY, INC.,

Defendant.

ORDER

THIS CAUSE is before the Court on the defendant's Motion for Summary Judgment on Counts II, III, and IV [D.E. 31]; and the plaintiff's Cross Motion for Summary Judgment on Count III.

BACKGROUND

This is an action for the return of a $50,000 deposit given by the plaintiff to the defendant in contemplation of being awarded a DryClean U.S.A. franchise. The complaint originally contained four counts, however, the plaintiff voluntarily dismissed Counts I, II, and IV. The remaining count alleges violations of the Florida Unfair and Deceptive

Appendix B

Trade Practices Act, Fla. Stat. §501.201 *et seq.*, ("Little FTC Act").

The Little FTC Act was enacted to protect individuals and business consumers from unfair methods of competition, and unfair, deceptive, and unconscionable practices in the conduct of trade or commerce. The Act defines unfair or deceptive acts or practices so that a violation of a Federal Trade Commission rule is a violation of the Little FTC Act. It creates a private cause of action where none existed under federal law.

Under the Federal Trade Commission Act and the rules promulgated thereunder, it is illegal for a franchisor to take a non-refundable deposit from a prospective or potential franchisee before disclosure of certain information. 16 C.F.R. §436.1. Here, the parties agree that the defendant accepted the $50,000 non-refundable deposit before making the required disclosures.

ISSUE

The issues to be decided under Count III are (1) whether the plaintiff can assert a claim under the Little FTC Act and (2) whether the FTC laws provide a cause of action to an Argentinean citizen for an Argentinean franchise.

STANDARD OF REVIEW

A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986). The moving party has the burden of proving its entitlement to summary judgment. *Id.*

ANALYSIS

A. Standing

The defendant argues that plaintiff does not have standing to bring the action since the Little FTC Act is designed to protect consumers and not sophisticated business entities. *See International Fast Foods Corporation and International Fast Food Polska v. Burger King Corporation*, Case No. 95-5130 CA 02 (case law reflects that the Florida Act does not apply to sophisticated business entities, but is designed to protect consumers). In support, the defendant argues that the plaintiff had substantial business experience and has had prior ownership or interest in several businesses.

The cases relied upon by the defendant interpreted the Act before the 1993 Amendment. Significantly, the statement of purpose has been amended to protect "the consuming public and legitimate business enterprises." §501.202(2). The Court finds the statute as amended applies to business enterprises as well as individual consumers. The defendant's limiting argument that even as to business enterprises the transaction must be consumer-type in nature is rejected.

The defendant further argues that a business lacks standing to bring suit under the Act. The Act as amended

eliminated an individual's ability to recover damages and limited the class of potential plaintiffs to consumers. The term "consumer" as defined allows an individual, corporation, or any other group or combination to recover damages under the Act. §501.203(7). The Court finds the plaintiff to be a consumer.

B. Extraterritorial application

Alternatively, the defendant contends that the Act was enacted for the purely domestic purpose of protecting consumers and does not contain any provisions suggesting that it is to be applied extraterritorially. Therefore, transactions involving the sale of franchises in Argentina to a non-U.S. citizen are not subject to U.S. or Florida franchise rules in that such transactions do not affect domestic concerns.

What the defendant suggests is that a U.S. franchisor may accept a $50,000 deposit from a foreign investor without making basic disclosures where it would be unlawful in a transaction involving a U.S. citizen. The defendant's argument is without merit. Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some acts are done outside the territorial limits of the United States. *See Branch v. Federal Trade Commission*, 141 F. 2d 31, 35 (1944).

CONCLUSION

The Court finds that the plaintiff has standing to bring his action under the Little FTC Act and that the Act applies to the transaction between the parties. It is

Appendix B

ORDERED AND ADJUDGED that the defendant's Motion for Summary Judgment as to Counts II, III, and IV is DENIED. The plaintiff's Cross Motion for Summary Judgment as to Count III is **GRANTED**. Accordingly, the plaintiff is entitled to a refund of the $50,000 deposit as actual damages, and attorneys' fees and courts costs for the defendant's violation of the Little FTC Act. §§ 501.211(2), 501.2105(1).

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 26TH day of March, 1997.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court U
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CLERK

No. 99-823

In The

Supreme Court of the United States

MARIO NIEMAN,

Petitioner,

v.

DRYCLEAN U.S.A. FRANCHISE COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, who challenged non-disclosures in Argentina as violations of the FTC Franchise Rule, now may challenge such conduct in this Court as unlawful under the FTC Act independently of the FTC Franchise Rule, when petitioner made no such showing or argument below.

2. Whether this Court should decide whether Florida law, which protects consumer transactions in Florida, creates a cause of action for Argentine residents who lack such rights under Argentine law, by extending Florida and FTC jurisdiction to commercial negotiations in Argentina with Argentine businessmen seeking rights to sell franchises in Argentina.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 Respondent states that it is a subsidiary of Dryclean U.S.A., Inc., which is a subsidiary of DCI USA, Inc., which in turn is a subsidiary of Delia's Cleaners Inc. Respondent has no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

Petitioner Nieman here seeks to escape from the theory on which he prosecuted his action below, to gain the "opportunity" to present a claim, Petition at 5, that he already had the opportunity to litigate but abandoned below. Nieman resolved the case below on cross motions for summary judgment, arguing that respondent DUSA's[1] failure to provide in Argentina, the U.S. FTC Franchise Rule disclosures violated the FTC Act and the Florida Deceptive and Unfair Trade Practices Act ("DUTPA") as a matter of law. Petitioner Nieman here abandons that claim. Petition at 5. Petitioner here argues for the opportunity to create below a factual record that non-compliance with U.S. law in Argentina was, as a matter of fact, unfair or deceptive irrespective of the Franchise Rule, a claim petitioner never pursued below.

A. NATURE OF THE CASE

Petitioner Nieman brought this action below to recover the non-refundable $50,000 deposit that his sophisticated Argentine business group negotiated and paid, in Argentina, for exclusive rights to negotiate a master franchising agreement to sell franchises in Argentina. Nieman's group paid these funds to respondent DUSA for its forbearance from contracting with other applicants while Nieman's group sought financing for the master franchise arrangement. After DUSA performed its promise, Nieman sought to avoid his own obligation to

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[1] Dryclean U.S.A. Franchise Company, Inc.

DUSA. Deciding not to go forward with the master franchising arrangement, Nieman came to Florida to demand return of the deposit that he tendered in Argentina as the non-refundable inducement for DUSA to forego business opportunities.

Nieman and his group were sophisticated businessmen with franchising expertise. Petitioner Nieman had over twenty years experience in the international courier business and in U.S. business practices. His principal partner, Guillermo Mizraji, was an Argentine attorney, law professor, and business consultant knowledgeable in franchise law. Two other partners had extensive experience in DUSA's own line of business and in advertising.

Although Nieman here portrays the facts to the contrary, virtually all relevant conduct in the transaction at issue here occurred in Argentina. The Court of Appeals so found. Petition App. A at 5a n.4. Petitioner Nieman so admitted in the trial court, where this action was submitted on cross-motions for summary judgment on stipulated facts. The parties' negotiations for the option contract did not occur in Florida, but "took place in the form of personal contracts [sic] between [DUSA's] agent in Argentina and Plaintiff [Nieman], telephone conversations and tax correspondences between Buenos Aires, Argentina and Miami/Ft. Lauderdale, Florida." Joint Pretrial Stip. Statement of Case, ¶ E. Petitioner's negotiations were solely aimed at the operation and sale of franchises in Argentina. The question below was whether DUSA was obligated to deliver in Argentina the disclosure documents required in the U.S. by the FTC Franchise Rule, which regulates franchise sales in the U.S.

DUSA, a Florida corporation, sought a sub-franchisor to develop dry-cleaning franchises across Argentina. After DUSA advertised in Argentina, Nieman, an Argentine citizen and resident, approached DUSA in Argentina to negotiate a master franchise agreement. Nieman offered and paid U.S. $50,000 for exclusive negotiation rights for a stated period in which Nieman could evaluate business prospects. Nieman explicitly agreed in Argentina that this deposit was not refundable. The personal negotiations between DUSA representatives and Nieman occurred in Argentina. Nieman signed a letter of intent, which tendered the non-refundable deposit, in Argentina. He wired his funds from Argentina to DUSA in Florida.

The letter of intent at issue here created rights and obligations solely in Argentina. DUSA promised to forebear from further seeking master franchisors in Argentina in exchange for the non-refundable deposit. The letter of intent contained no choice-of-law provision, and the parties never executed any agreement that chose Florida law.

Petitioner Nieman makes no claim that DUSA failed in Argentina to abide by Argentine law. Petitioner claims instead that DUSA, while in Argentina, failed to provide Nieman's Argentine business group with franchise disclosure documents applicable to franchise sales in the U.S. under the FTC Franchise Rule. Nieman made no claim that any Argentine law required such disclosure. Neither does Nieman claim that DUSA ever refused him any information his group requested during negotiations. Nieman did not claim below, on the cross-motions for summary judgment, that DUSA's conduct misled him or was, as a matter of fact, deceptive. Indeed, Nieman argues that issues of his knowledge or reliance were

irrelevant under the FTC Franchise Rule, where liability was "strict."[2]

B. PROCEEDINGS BELOW

To recover his $50,000 payment, Nieman orginally filed a four-count petition in Florida state court alleging four federal and state statutory violations. DUSA removed the case to federal district court. 28 U.S.C. § 1441(a) (1994). The Court then dismissed all claims other than Count 3, which alleged that DUSA breached the DUTPA by failing to provide disclosures required under the FTC Franchise Rule, 16 C.F.R. § 436.1. Nieman argued in his motion that DUSA's "failure" was actionable under Florida's DUTPA, which creates a private cause of action for violations of the FTC Franchise Rule. Nieman never claimed below that the failure to tender

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[2] *See* Petitioner's Mem. of Law and Fact in Support of Plaintiff's Cross-Motion for S.J., at 14-15. Petitioner summarized his argument as follows: "Plaintiff has paid Defendant $50,000 . . . under circumstances where [ ] there was a *per se* ***violation of the FTC Regulations*** regarding the Defendant franchisor taking money from Plaintiff prior to providing disclosures as required under 16 C.F.R. § 436.1. Accordingly, Plaintiff is entitled to a refund of the $50,000 as 'actual damages' sustained by Defendant's violation of the Little FTC Act, Fla. Stat. § 501.201 *et seq.*, which incorporates as actionable the ***violation of the FTC Regulation*** requiring delivery of the UFOC to the franchisee prior to taking any funds from franchisee." *Id.* at 4. Petitioner's argument heading read: "Under Florida Law, Plaintiff Is Among The Class Protected By The Unfair and Deceptive Trade Practices Act (Fla. Stat. § 501.201 *et seq.*, As Amended In 1993), Which Defines As Deceptive Those Acts Which ***Breach FTC Promulgated Regulation***." *Id.*

franchise documents violated the FTC Act independently of the Franchise Rule.

The parties submitted the case on cross-motions for summary judgment. DUSA concededly did not tender the franchise disclosure documents required under the Franchise Rule. Petition at 3a. DUSA, like most international investors, believed that the Rule did not address foreign sales of franchises in foreign countries under foreign management. To the contrary, Nieman argued that violation of the Franchise Rule was, without more, a DUTPA violation. Nieman did not raise any theory below by which DUSA's inaction might be found unlawful under DUTPA other than as a violation of the Franchise Rule, which Nieman now concedes does not apply.

The district court granted Nieman's motion for summary judgment. In a single sentence, the court declared that the FTC Act and the Franchise Rule applied extraterritorially. The court relied on one case holding the FTC had the ***power*** to pursue U.S. companies engaging in foreign commerce whose fraudulent domestic activities created adverse effects on their U.S. competition. The court made no findings, and had no evidence before it, of such facts here. DUSA timely appealed.

The Court of Appeals for the Eleventh Circuit reversed the trial Court's decision and held that the Franchise Rule does not apply extraterritorially. The Court found that the FTC Act, in its unfair and deceptive practices jurisdiction, does not contain the necessary express language to overcome the presumption against extraterritorial application. The Court likewise found that the FTC did not promulgate the Franchise Rule to protect

franchisees in foreign countries. Petitioner does not challenge this latter finding. Instead, Nieman argues here, for the first time, that DUSA's failure to provide unsolicited information in the form of domestic Franchise Rule disclosures to a franchisee in Argentina is deceptive, as a matter of fact, and violates the FTC Act independently of the Rule. Nieman so argues to create a claim here under the Florida DUTPA, an issue of state law.

REASONS FOR DENYING THE WRIT

This Court generally does not address an issue unless it is potentially outcome determinative. *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1970) ("This Court- . . . reviews judgments, not statements in opinions"). Neither does this Court address issues not raised or considered below. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"); *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). These general rules have particular potency here. Petitioner neither raised his primary argument below nor developed the record to support the new argument. Petitioner in effect asks this Court to construe state law, the Florida DUTPA, which by its own terms faces additional limitations that render it inapplicable here.

I. NIEMAN'S PETITION RAISES ISSUES AND FACTS NOT PRESENTED BELOW

This Court should not grant certiorari in this case because the primary question presented for review was not raised below and the factual record does not support it. Nieman asks this Court to decide whether the FTC Act and the Florida DUTPA apply extraterritorially independently of the FTC Franchise Rule. Nieman below argued only that DUSA violated the FTC Franchise Rule; he neither argued nor made a factual record of deceptive conduct violating the FTC Act independently of the Rule. In his petition, however, Nieman now concedes that the Eleventh Circuit correctly held that the Franchise Rule does not apply extraterritorially. Nieman pursued below, however, no other grounds for violation of the FTC Act or DUTPA. Unless this Court decides to part from its normal practice and address a new issue here, there is no issue before the Court that could support a reversal of the judgment.

Under the Franchise Rule, franchisors are required to supply franchisees with designated information about their franchise. The substance of these disclosures reveals a purely domestic, rather than extraterritorial application. The Eleventh Circuit correctly held that the Franchise Rule does not cover foreign sales of franchises to be located outside of the United States, and the DUSA's actions were lawful. *Nieman v. Dryclean U.S.A.*, 178 F.3d 1126 (11th Cir. 1999). Nieman's new argument rests on the proposition that failure to make these disclosures to a franchisee outside of the United States violates the FTC

Act irrespective of the Franchise Rule. This new argument should not be considered by the Court.

Even if this question warranted a special exception to the rule against raising issues for the first time before this Court, there is no factual record to support the adjudication of this question here. To support such a claim, Nieman must show that DUSA participated in "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1) (1994). He now claims that the failure to provide Franchise Rule disclosures in a transaction not covered by the Franchise Rule is itself unfair. There is no factual record to allege that DUSA's conduct was either unfair or deceptive. The factual record indicates that Nieman is an experienced businessman and part of a large group of investors who, in an arms length transaction, sought to obtain franchising rights for an entire country. There is no indication Nieman ever asked for the information that DUSA failed to provide. Because Nieman did not raise the issue on this claim for review below, Nieman's petition should be denied.

II. QUESTIONS OF STATE LAW DEFEAT PETITIONER'S CLAIM UNDER THE FLORIDA STATUTE HERE

At its core, Nieman's petition requires the interpretation of Florida law. This Court does not generally decide issues of state law, but instead defers to the decisions of district courts and courts of appeals on state law. *Sheridan v. United States*, 487 U.S. 392, 402 n.6 (1985) (remanding to district court issue whether particular facts constitute a cause of action under Maryland law). *See also Cort v. Ash*,

422 U.S. 66, 72 n.6 (1975); *C.I.R. v. Real Estate of Bosch*, 387 U.S. 456, 462 (1967).

Because Nieman cannot bring a private cause of action under the FTC Act, he brings his claim under the Florida DUTPA. Two issues of state law arise from this entanglement of Federal and Florida law. The first is whether DUSA's actions were unlawful under DUTPA, regardless of whether they may violate the FTC Act. The second is whether Nieman has standing under DUTPA to bring this claim. Neither the district court nor the court of appeals decided these issues.

The interpretation of the Florida statute is an issue properly left to the lower courts. DUTPA declares "unfair or deceptive acts or practices" unlawful and declares that "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." Fla. Stat. § 501.204(2) (1993). Federal interpretations of the FTC Act's "unfair and deceptive acts or practices" language, however, may not be identical to Florida's interpretation of the similar language in DUTPA. Adjudicating the question of whether DUSA's actions were unlawful under the FTC Act will not conclusively answer the question of whether they were unlawful under DUTPA.

Florida law also controls the question of whether Nieman is within the protection provided by DUTPA. DUTPA protects only consumers. *See* Fla. Stat. § 501.203(7) (1993). The Florida Court of Appeals recently

held that DUTPA did not include a manufacturer within its protections. *Warren Technology, Inc. v. Hines Interests Limited Partnership*, 733 So. 2d 1146 (Fla. App. Dist. 1999). In *Warren*, the Florida Court indicated that DUTPA does not protect individuals or groups of individuals acting as producers or manufacturers. Nieman's investment group intended to sell individual franchises to smaller franchisees. Whether this investment group is a consumer under Florida law is a question best determined by a lower court.

III. THE COURT OF APPEALS DECIDED THE ISSUE CORRECTLY AND THERE IS NO SPLIT IN THE CIRCUITS

The Eleventh Circuit correctly determined that the FTC Act and the Franchise Rule do not apply extraterritorially. It is a long-standing principle that, unless a contrary intent expressly appears, statutes and regulations apply only within the territorial jurisdiction of the United States. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *see also Smith v. United States*, 507 U.S. 197, 204 (1993); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1425 n.12 (11th Cir. 1995). To overcome this presumption, the petitioner must show that Congress expressly intended application of a particular law outside U.S. borders. Statutory language, legislative history, or administrative interpretations must express a clear intent that a rule apply within the borders of a foreign country. *Arabian American Oil Co.*, 499 U.S. 244; *see also Foley Bros.*, 336 U.S. at 285-88; *McCulloch v. Sociedad Nacional de Marineros de Honduras*,

372 U.S. 10, 19 (1963). Even statutes that expressly reach parties in "***foreign*** commerce" do not necessarily apply to conduct within the borders of a foreign country. *Arabian American Oil Co.*, at 251 (emphasis in original).

Reference to "foreign" commerce within the "commerce" addressed by the FTC Act does not create extraterritoriality. "We have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." *Arabian American Oil Co.*, 499 U.S. at 251 (emphasis in original). Extraterritorial intent cannot be "deduced by inference from boilerplate language which can be found in any number of congressional Acts none of which have ever been held to apply overseas." *Id.* (citing statutes). Plausible explanations of boilerplate language do not overcome the presumption against extraterritorial application. *Id.* at 250.

This Court has held that jurisdictional language similar to that of the FTC Act does not permit extraterritorial application. The Court in *New York Central R.R. v. Chisholm*, 268 U.S. 29 (1925), held the phrase "engaging in commerce between any of the several states . . . and any foreign nation or nations," is insufficient for extraterritorial application. *Chisholm* noted that the Federal Employer's Liability Act, 45 U.S.C. § 51 ("FELA") "contains no words which definitely disclose an intention to give it extraterritorial effect." *Chisholm*, 268 U.S. at 31. *Chisholm* held that FELA did not create rights or liabilities when a U.S. interstate carrier – in "foreign commerce" – killed a U.S. employee in an accident in Canada. The *Arabian American Oil Co.* Court approved this analysis.

The Court in *Arabian American Oil Co.*, 499 U.S. at 251-52, cited *McCulloch* as an example of the presumption against foreign application of U.S. law. In *McCulloch*, 372 U.S. 10, the Court held that defining "commerce" as "any trade, traffic, commerce, transportation or communication . . . between any foreign country and any State," 29 U.S.C. § 152(6), did not manifest an intent for extraterritorial application. *Id.* at 551 n.3, 555. "Even though the NLRA contained broad language that referred by its terms to foreign commerce, § 152(6), this Court refused to find a congressional intent to apply the statute abroad because there was not any 'specific language' in the Act reflecting congressional intent to do so." *Arabian American Oil Co.*, 499 U.S. at 251-52. *See also Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 146-47 (1957).

Petitioner's reliance on general jurisdictional language to support extraterritoriality pursues a flawed theory. References to foreign commerce in boilerplate jurisdictional statements identify the parties to whom the law applies, not the location of those parties' acts to which the law applies. The language establishes federal jurisdiction over U.S. parties engaged in foreign commerce; without more, the language does not establish that jurisdiction extends to those acts of those parties that occur in a foreign land, as in *Chisholm*, *Arabian American Oil Co.* and *McCulloch*. The FTC Act creates FTC jurisdiction over a U.S. business in foreign trade, whose fraudulent actions inside the United States harm U.S. competitors. *See Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944). It does not extend jurisdiction over a U.S. company whose acts in a foreign country may harm citizens of that foreign country.

Neither do these boilerplate jurisdictional statements extend jurisdiction over acts committed in a foreign land, even if harming U.S. citizens there. In *Chisholm*, for example, the Court refused to equate jurisdiction "over foreign commerce" with the extension of FELA jurisdiction to an accident, outside the United States, in which a U.S. company killed its U.S. employee. In *McCulloch*, the Court ruled U.S. law did not apply aboard a foreign flagged ship – in essence, on foreign territory – in a U.S. port, even though the law reached activities "in foreign commerce." In *Arabian American Oil Co.*, the Court ruled the same for a U.S. company's discrimination against a U.S. employee abroad. No basis exists to believe that FTC "unfair or deceptive practice" jurisdiction, distinct from its antitrust jurisdiction, is any different.

Congress is capable of expressing an affirmative extraterritorial intent when it so desires. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Indeed, Congress has explicitly extended the antitrust jurisdiction extraterritorially. 15 U.S.C. § 45(a)(3) (1994). The FTC unfair and deceptive trade practice jurisdiction, in contrast, has no such express intent, *see* 15 U.S.C. § 45(a), and neither the agency nor the Department of Justice ever has indicated that the statute so applies. Petitioner reads this explicit grant of extraterritorial authority as a limitation on a broader, implicit extraterritoriality "deduced by inference," *Arabian American Oil Co.*, 499 U.S. 251, from presumed intent. Petitioner stands this Court's decision in *Arabian American Oil Co.*, on its head. Extraterritorially is neither presumed nor "deduced by inference." *Id.*

There is no conflict in the Courts of Appeals over the extraterritorial application of the FTC Act. Nieman relies exclusively upon the Seventh Circuit's 1944 decision in *Branch* to show disagreement among the circuits on this issue. Petitioner's reliance on dicta from the Eleventh Circuit's opinion below to illustrate this conflict is unfounded. *Branch* does not conflict with the Eleventh Circuit's opinion below. Nieman argues that *Branch* identifies an express intent for extraterritorial applicability of the FTC Act. *Branch* does not. *Branch* did not apply the FTC Act extraterritorially. The Court below distinguished *Branch* from the case at bar and noted that the *Branch* decision predicated jurisdiction on the effect of fraudulent ***domestic*** activities on ***domestic*** competition. *Id.* at 35. Indeed, the *Branch* Court specifically stated it was ***not*** applying the FTC Act extraterritorially, and that extraterritorial effects were irrelevant to its decision. *Id.* No conflict exists. Indeed, petitioner cites to no other case in the last 55 years to support the notion that lower federal courts lack clear judgment in this area of the law.

CONCLUSION

For the foregoing reasons, this Court should deny Nieman's petition.

Respectfully submitted,

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